

KEARNS *v.* STEINKAMP.

Opinion delivered January 25, 1932.

1. APPEAL AND ERROR—CONCLUSIVENESS OF VERDICT.—A verdict will not be disturbed on appeal because it is against the preponderance of the evidence if it is supported by substantial evidence.
2. HUSBAND AND WIFE—LIABILITY FOR TORT.—Where a husband purchased a swimming pool property, taking deed to himself and wife, but he alone managed the pool, in an action against both for the death of a minor killed therein, it was proper to direct a verdict for the wife.
3. APPEAL AND ERROR—NECESSITY OF TIMELY OBJECTION.—Objection to the competency of jurors is too late when first raised in the motion for new trial.
4. NEGLIGENCE—ADMISSIBILITY OF EVIDENCE.—In an action for death of a boy killed while diving in a swimming pool, where the negligence alleged was in having a water-soaked and submerged raft which he struck, testimony of a witness that prior to the killing

he had hurt his hand on the same raft was properly excluded, it not being shown that the raft was submerged at the time of his hurt.

5. NEGLIGENCE—EVIDENCE.—Subsequent precautions to prevent recurrence of an injury cannot be proved to establish negligence in the first place.
6. NEGLIGENCE—EVIDENCE.—In an action for death of a boy killed while diving in a swimming pool, alleging that he struck a submerged raft, testimony of a witness as to the condition of the raft was competent.
7. TRIAL—INSTRUCTION ASSUMING DISPUTED FACT.—Refusal to give a charge which assumed the question at issue was properly refused.
8. TRIAL—ARGUMENT OF COUNSEL.—Comment in argument by defendant's counsel on plaintiff's failure to produce an available eyewitness *held* proper.
9. NEW TRIAL—NEWLY DISCOVERED EVIDENCE.—To grant a new trial upon newly discovered evidence, such evidence must be more than merely cumulative, and due diligence must be shown to get the evidence at the trial.

Appeal from Garland Circuit Court; *Earl Witt*, Judge; affirmed.

Leo P. McLaughlin and *Richard M. Ryan*, for appellant.

Murphy & Wood, for appellee.

McHANEY, J. Appellant brought this action to recover damages from appellees for the injury and death of her son, Joe Kearns, which occurred on the 13th day of July, 1930, at a swimming pool and resort owned by appellees and known as Ozark Lithia Springs, near Hot Springs, Arkansas. Joe Kearns was a frequent visitor, and had been for some years prior to its purchase by appellees, to the swimming pool at Ozark Lithia Springs, and was well acquainted with said pool and its condition. On the above date, while swimming therein, he dived off the concrete wall, some 14 to 18 inches above the surface of the water, and struck his head on a raft provided by the owner for the amusement of his patrons and safety and convenience of inexperienced swimmers, breaking his neck, from which he died some hours later. Three grounds of negligence were alleged: (1) in not keeping the swimming pool free from obstructions, mak-

ing it a safe place for swimmers; (2) by permitting said wooden raft to be in the pool; and (3) in permitting the raft to become water-soaked causing it to sink below the surface of the water and not plainly visible to bathers in the pool. Appellees denied that they were guilty of any negligence, and stated that the injuries received by Joe Kearns which resulted in his death were caused by his own negligence in diving against said raft because it was plainly visible above the surface of the water and could have been seen by him if he had looked. They also pleaded that deceased assumed the risk. The case was tried on the theory that appellees permitted the raft to become water-soaked which caused it to be submerged below the surface of the water and not easily visible to swimmers in the pool, and that it was a dangerous instrumentality in this condition. The court instructed a verdict for appellee, Sophia Steinkamp, but submitted the liability of William Steinkamp to the jury. There was a verdict and a judgment for him, and the appellant has brought the case to this court for review, charging a number of errors of the trial court for a reversal.

The first argument made is that "the proof in the case preponderated that the Steinkamps were guilty of what we might deem gross negligence in this case. The verdict was wrong." We do not understand that appellant contends there was no substantial evidence on which to base the verdict, but only that it is against the preponderance of the evidence. Even though we might think that the verdict was against the preponderance of the evidence, this would be no cause for this court to reverse the judgment. The rule in this court is that the verdict of the jury will not be disturbed unless there is no substantial evidence to support it. A number of appellant's witnesses testified that the raft had become water-soaked and submerged so that it would not float above the surface of the water, and on the other hand, a similar number of appellees' witnesses testified exactly to the contrary—that the raft floated two or three inches above the surface of the water, was plainly visible, and being

four or five feet wide and ten or twelve feet long, would support several swimmers at the same time without sinking, and the undisputed proof is that when Joe Kearns dived against the raft he fell across one corner of it, and that it supported his body which was paralyzed from the arms down. This made a conflict in the evidence which the jury has settled against appellant, and under the settled rule of this court it must be permitted to stand.

Error is also assigned because the court directed a verdict in favor of Mrs. Steinkamp. The undisputed proof is that Mr. Steinkamp purchased the property and took the deed in their joint names creating an estate by the entirety, but that he was in the entire charge of operating the property, especially the swimming pool, with which she had nothing to do. There was no relation of master and servant or principal and agent subsisting between them, and therefore the doctrine of *respondeat superior* has no application, and the court correctly instructed a verdict in her favor.

Error is also assigned because the court did not excuse certain jurors in forming the petit jury to try the case. It is said that these jurors were incompetent to serve under the provision of act 135 of the Acts of 1931, which became effective June 20, 1931. This act provides in § 1 that no citizen shall be eligible to serve on grand and petit juries oftener than one regular term of the court every two years, and it is said that some of the jurors had served within the past two years. Appellant made no objection to any of these jurors for this or any other reason before the trial of the case, but raised it for the first time in the motion for a new trial. The objection therefore came too late. Litigants will not be permitted to thus speculate on the verdict of the jury. *Durben v. Montgomery*, 145 Ark. 368, 224 S. W. 729; *Mo. Pac. Rd. Co. v. Bushey*, 180 Ark. 19, 20 S. W. (2d) 614; *Fones Bros. Hdw. Co. v. Mears*, 182 Ark. 533, 32 S. W. (2d) 313.

Error is assigned because the court excluded the testimony offered by two witnesses relating to an injury to

the hand of one of them by coming in contact with the raft some time prior to the injury in question. We think the court properly excluded the testimony of these witnesses because it was not shown that the injury was caused by the water-soaked or submerged condition of the raft, and this is the ground the court excluded it on.

It is also argued that the court erred in refusing to permit appellant to prove by two witnesses that the raft was taken out of the pool after the accident and why. This testimony was not relative or material to the inquiry, as the negligence alleged and relied upon was whether appellant was negligent in keeping a water-soaked and submerged raft in the pool. Subsequent precautions taken to prevent a recurrence of an injury cannot be proved to establish negligence in the first place. *Prescott & N. W. Ry. Co. v. Smith*, 70 Ark. 179, 67 S. W. 865; *Ft. Smith L. & T. Co. v. Soard*, 79 Ark. 388, 96 S. W. 121; *Collison v. Curtner*, 141 Ark. 122, 216 S. W. 1059, 8 A. L. R. 760. Also Frank Eveland's testimony was properly admitted, as it was directed to the point in issue, that is the condition of the raft.

A number of objections are made to instructions given and instructions refused, all of which we have examined carefully and do not find them open to the objections made. As to the refusal to give appellant's No. 7, it was properly refused, as it assumed that the raft was water-soaked and submerged—the very question at issue in the case. We think the court fully and fairly instructed the jury on every question at issue, and that the instructions as a whole were correct. It would take too much space in the opinion to set them out and comment on them separately.

The objection made to the language used by one of the attorneys of appellee in his argument to the jury we think is without merit, and could have resulted in no possible prejudice. The language used was: "George Leatherman was out there when this happened. He is an officer of the county. He is human, and his sympathy would have been with the boy who lost his life." This

statement was made in connection with the failure of appellant to produce available witnesses, and we think was proper under the circumstances.

It is finally insisted that the court erred in failing to grant a new trial on account of newly discovered evidence. This newly discovered evidence appears to be cumulative merely, and the court did not err in refusing to grant a new trial on this ground, as it is well settled that the newly discovered evidence must be more than merely cumulative, and that due diligence must be shown in an effort to get the evidence before the trial. We find no error, and the judgment is affirmed.

APPENDIX

APPENDIX I.

IN MEMORIAM.

JOHN B. McCALEB

At a meeting of the court held on November 30, 1931, Mr. Samuel M. Casey of the Batesville bar presented the following resolutions relative to the death of John B. McCaleb.

RESOLUTIONS OF INDEPENDENCE COUNTY.

May it please the court:

On behalf of the Batesville bar, and under appointment by the Independence Circuit Court, we beg permission of this court to present the following memorial resolution:

John B. McCaleb was born at Evening Shade, Arkansas, on the 24th day of October, 1856; educated there and at Rhea Springs, Tennessee; admitted to the bar in the year 1881; was the first Judge of the Sixteenth Judicial Circuit of this State, serving for three terms, from 1891 to 1903; chairman of the State Capital Commission, which had charge of the construction of the splendid building in which this court is held, from 1903 to 1909, and a delegate from Independence County to the Constitutional Convention in 1918.

He located at Batesville in the year 1906 and formed a partnership in the practice of the law with L. F. Reeder, which continued until Judge Reeder was elected chancellor in 1919; since then he had as his associate his son, Joe J. McCaleb, under the firm name of McCaleb & McCaleb, enjoying an extensive practice. He was long a member of the American Bar Association and also the Arkansas Bar Association. He died quietly and peacefully, without previous warning, at his home in Batesville on Sunday morning, August 2, 1931.

In the death of Judge McCaleb, the Batesville Bar lost its oldest active practitioner, and the State a lawyer of high ideals and outstanding ability. As circuit judge he enjoyed to a remarkable degree the confidence and respect of the general public, as well as the legal profession; as a practitioner he was studious and painstaking, a total stranger to sharp practices and questionable methods. During the half century since his admission to the bar, he has reflected credit upon his chosen profession; he was scrupulously ethical, honest and conscientious. He was ever courteous, kind and considerate toward his fellow attorneys, particularly those younger and less experienced than he.

As a citizen, his life was clean, honorable and upright. He took a lively interest in every movement looking to the public good and betterment. His record as a lawyer and as a citizen is untarnished and unsoiled. His death has left a vacant place in his home bar and in the community and State where he lived.

Therefore, be it resolved, That in the death of Judge McCaleb the profession has lost one of its outstanding members and the State one of its purest and most honorable citizens, and we who knew him for many years, in this feeble manner, give expression to and record our respect and appreciation of his genuine worth and ability.

Chas. F. Cole,
Samuel M. Casey,
L. F. Reeder, *Committee.*

In presenting the Resolutions of the Independence Bar, Hon. Sam M. Casey spoke as follows:

May It Please The Court:

We appreciate the courtesy and kindness that this Honorable Court has done us, a committee from the Bar of Independence County, in giving us this opportunity to present the Resolution adopted there recently in memory and out of respect to Judge John B. McCaleb, long an honored, faithful and distinguished member of his profession.

In recognition of that kindness and courtesy, we shall show our appreciation by not trespassing at any great length upon your valuable time.

And, yet, does this occasion in truth call for any condescension or apology, when you are asked to pause amid your daily labors and the consideration of such transient questions as demurrers, motions, pleas of *stare decisis*, *res adjudicata*, etc., and, in obedience to the holiest impulse of humanity, contemplate the profoundest mystery of human destiny—the mystery of death?

These, and like services, are not alone to do proper homage to the dead, but they are likewise compensating in their effects upon the living. What honor it does to the living to remember the dead! How sacred is the duty that bids us pause for an hour amid life's struggles and gather a flower and lay it upon the altar of remembrance for those who have fallen by our sides and gone behind the curtain that divides time and eternity. How lighter is made the daily task! How much more keenly may we enjoy the beauties and pleasures of earth, in which there is always more sunshine than shadow, more hope than despair, if we know that, when we, too, are gone, the living will forget our faults and remember only our virtues in gentle words and loving service!

It is recorded of an Eastern Monarch that he kept an officer in his house, whose sole employment it was to remind him of his mortality by calling out at a stated hour each day: "Remember Prince, that thou shalt die," and the contemplation of the frailty and uncertainty of our present estate appeared of so much importance to Solon of Athens, the wisest man of his time, that he left to future ages this precept: "Keep thine eye fixed upon the end of life." And certain it is that a frequent and attentive prospect to that moment which must put a period to all our schemes and deprive us of all our acquisitions is of the utmost efficacy to the just and rational regulation of our lives. Nor would anything wicked or anything absurd be undertaken by him who should begin each day with the solemn reflection that he was born to die.

"Think," says an eminent philosopher, "frequently on poverty, banishment and death, and thou wilt never indulge violent desires or give up thy heart to mean sentiments." That this maxim is founded on just observation will easily be granted when we reflect how that vehemence of eagerness after the common pursuits and objects of life is kindled in our minds. We represent to ourselves the pleasure of some future possession and suffer our thoughts to dwell attentively upon it, until it has wholly engrossed the imagination and permits us not to conceive any happiness, but its attainment, or any misery, but its loss. Every other satisfaction which the bounty of Providence has scattered over life is neglected as inconsiderable in comparison with the great object, which we have placed before us, and is thrown from us as incumbering our activity, or trampled under foot as standing in our way. Every man has experienced how much of this ardor has been remitted, when a sharp or tedious sickness has set death before our eyes. The extensive influence of greatness, the glitter of wealth, the praises of admirers, have appeared vain and empty things when the last hour seemed to be approaching, and the same appearance they would always have if the same thought was always predominant. We should then find the absurdity of stretching out our hands incessantly to grasp that which we cannot keep, and wearing out our lives in vain endeavors to add new turrets to the fabric of ambition, when the foundation itself is sinking and the ground on which it stands is mouldering away.

In the passing of Judge McCaleb, this bar, his city, county and State, have sustained a distinct loss.

Born just four years before the beginning of the Civil War, of an honorable but poor parentage, he experienced, as a boy and young

man, all the rigors and hardships of reconstruction days, which were probably no more severe in any section than in the place of his birth, North Arkansas; and it is a tribute to his character and worth that, notwithstanding the lack of advantages, the scarcity of schools, and the paucity of knowledge, he secured an education beyond the average for his surroundings, and with it a thirst for knowledge and appreciation of the better and nobler things that enriched his later life and made him the useful, honored and respected citizen, of which his family, friends and fellow-citizens had just cause to be proud.

He represented in his life and practice the homely virtues, the native honesty and purity of purpose and life that we sometimes fear is not as common as in days that are past and gone. We know that one who criticizes the present and makes unfavorable comparisons with the past does so at the risk of being called, old and out of date; but a calm consideration and contemplation must convince us, as lawyers, that our profession, while it has made great progress and still contains among its members as pure patriots and good citizens as any other, has nevertheless lost some things it might have kept.

Judge McCaleb was a man of rare spirit and many virtues. He possessed in a fine degree the happy faculty of generous mindedness, unselfishness, and true hospitality. He enjoyed life and lived it to the uttermost, until a few years before his death, when serious afflictions and sorrows beset him, which would have undermined the spirit and soul of most of us. He was a great reader all of his life, and possessed a splendid fund of information on many subjects beside the law, gathered from a wide course of reading and observation, but in the last few years of his life he suffered the almost complete loss of his eye-sight—grievous affliction for any one. But it must have been doubly so for him, forced to deny himself this great solace of lonely hours. Yet I never heard him murmur or complain. He was of an unusually cheerful disposition, in the face of his afflictions, the death of his eldest son, in whom he took just pride, and the loss of his faithful wife and companion, about two years before his death, who had travelled the road of life with him for almost half a century, either of which was enough to overwhelm a braver spirit. But with it all he did not become morose, fretful or complaining, as so many would under like circumstances, but exhibited a rare spirit of resignation and was a joy and pleasure to his friends and acquaintances. During these last years he seemed to say in his life and action, as his Master before him: "Not my will but Thine be done." He seemed to have that calm resignation and trust so beautifully expressed by Whittier in his poem "The Eternal Goodness," when he wrote:

"And so beside the silent sea,
I wait the muffled oar,
No harm from Him can come to me
On ocean or on shore.
"I know not where his islands lift
Their froned palms in air,
I only know I cannot drift
Beyond his love and care."

Notwithstanding these great losses, Judge McCaleb's home life, even after the loss of his wife, was blest with the devotion of some lovely daughters and the affection of some grandchildren, whom he idolized, and his life was made as happy as it was humanly possible to be under these circumstances. A short time before his death he showed me a magazine published in another State, which contained a poem written by a daughter, and I wondered if it was not written with reference to his affliction, the loss of his eyesight. The title of the poem was "Reawakened," and, as it contains only two short stanzas, and marks the author as one of no mean ability, I quote it:

"Until God took away my sense of sight,
I never knew what beauty I passed by;
But now the lilt of bird notes, clear and high,
Lifts my dulled hearing to an undreamed flight.

"The keen, fresh odor of the rain-splashed pine,
The new-turned earth, now trill with fragrance true;
When wakened senses grasped each note and perfume new
The beauty of God's wondrous world then entered mine."

He was generous to a fault, and possessed the true spirit of chivalry and courtesy.

I have sat with him in several consultations regarding lawsuits, and been opposed to him in many, but I have never heard him suggest or intimate the slightest variation in the conduct of a case from the principles of absolute honesty and fairness, and no one who knew him would have had the temerity to suggest to him such a course.

He was combative, vigilant and energetic in presenting his client's side of any controversy, and jealous of his client's rights and interests, and would no more have thought of sacrificing any of them than he would have thought of taking an unfair advantage of his adversary.

If he had his faults, and who of us have not, I should say it was in a too generous heart and charitable judgment of mankind. He was one who could easily be imposed upon, and believed that all folks were honest like himself, until sometimes he was disillusioned.

But of the two characters, the man of cynical disposition, who distrusts and suspects everybody, and believes that no one is honest,

and that there is none good, "no, not one," and who acts upon the theory expressed by the dissolute Lord, who said that, "every man has his price," or that other gentle spirit, like our departed friend, who tries to see good in all, and looks with charity upon their failures and weaknesses, and forgets the foibles and faults of his brothers, and magnifies the virtues, who would hesitate to choose between them? Would we not rather prefer the philosophy expressed in the little rhyme:

"In men whom men condemn as ill,
I find so much of goodness still.
In men whom men regard divine
I find so much of sin and blot,
I hesitate to draw the line,
Between the two, where God has not."

The line from Oliver Goldsmith's "Deserted Village," describing the village preacher, aptly fitted Judge McCaleb:

"And e'en his failings leaned to virtue's side."

Judge McCaleb served as circuit judge of the Sixteenth Judicial Circuit for twelve years, and his reputation for fairmindedness, clear thinking, impartiality, dispatch of business, and enforcement of law, gave him a State-wide reputation, and it was frequently said by lawyers, outside of his district, that he had no superior in the State as a presiding judge. He held the scales of justice as evenly poised as it is possible to do, and no man who came into his court, be he poor or rich, could say, with truth, that he had not had a fair and impartial trial, in so far as it lay within the power of the presiding judge to insure that somewhat indefinable and uncertain thing,

And, while it probably could not have been said, as it was said during the reign of King Alfred, that such was the respect for the law that a golden cup could be hung at every spring in the kingdom, without danger of being molested, it could be said in truth that the law was respected, obeyed and enforced to a degree, unfortunately not always maintained.

Your humble servant, together with many others, has sustained a personal loss in the death of Judge McCaleb. This bar, and his home bar are the poorer by his passing. When he slipped away at night, without warning, after he had lain down to sleep, and awoke on that other shore, may we express the hope that, as the great Edison said just a few days before his death, when awakened from a dream, "he found it beautiful over there," and that he will remember us as we remember him.

Shakespeare had one of his characters say this, which I quote in conclusion:

"In the corrupted currents of this world
Offense's gilded hand may shove by justice,
And oft 'tis seen the wicked prize itself
Buys out the law; but 'tis not so above;
There, is no shuffling, there the action lies
In his true nature, and we ourselves compelled
Even to the teeth and forehead of our faults
To give in evidence."

Mr. George B. Rose spoke as follows:

MAY IT PLEASE THE COURT:

The Bar of Batesville justly feel that the high professional standing of Judge McCaleb makes his death a loss to the entire State, and not merely a local misfortune; and because I was for many years his friend, and was born in the little city where he practiced with such distinction, they have asked me to lay my humble tribute upon his grave.

For some reason which I have never been able to understand, the inhabitant of a large city imagines that something of his city's greatness inheres in him, so that he feels wiser, abler, more accomplished than any one living in a smaller place. How often have I heard members of the bars of New York, Chicago, and other large cities speak with condescension and even with contempt of the country lawyers of their states. Of course, I know nothing of the justice of their attitude; but, if they are right, Arkansas is singularly blest; for there is hardly a county where you will not find at least one lawyer who is a man of learning and ability, sober, industrious and reliable, and who will protect the rights of his clients with vigor and efficiency in the courts and serve as a wise and prudent counselor in their business affairs; and usually you will find several such men—men who would hold their own at a metropolitan bar if circumstances should give them a foothold there.

And these country lawyers are the sheet-anchor of our safety. Not only have they taken an oath to support the Constitution of the United States and the Constitution of the State of Arkansas, but they are deeply attached to constitutional principles, equally opposed to the conspiracies of the bolshevists and to the machinations of rapacious greed. Unlike the lawyers of the great cities, whose retainers by large corporations arouse suspicions in the hearts of the people, they are intimately known to their fellow citizens, who have learned to realize their rectitude of purpose, their abilities, and their wisdom, and who turn to them for guidance in every emergency. As long as we have a strong, honest and fearless country bar, such as Arkansas has always had, we need not despair of the Republic. As long as we have such leaders scattered over our State, times of depression like those through which we are now passing will not drive our

people to bolshevism, but, with strong faces set to the rising run, they will work out their own salvation.

Batesville has from the earliest times been distinguished for the ability of its local bar. In consequence of its beautiful location, and, because it was the head of navigation on White River, lawyers of conspicuous ability gathered there, and rode far and wide the Northern circuit. When my father, a young attorney just out of law school, located there in 1853, he found a bar of exceptional talents and learning; and it was in contests with these men that he received the training that led to his later success. He always looked back to Batesville and to the friends of his youthful manhood with a warm affection.

The leaders of the bar whom my father knew and loved in those early days have all gone to their reward, leaving behind them memories that are dear to their descendants and to their fellow-townsmen; but the high standard of ability and integrity which they established has been maintained; and in none more conspicuously than in Judge McCaleb. He was one of the purest-hearted gentlemen that I have ever known, kind, charitable and loyal, who clasped his friends to him with hooks of steel, and who in every question of morals or the public welfare was always to be found upon the right side—a leader of whom any community might be proud.

He was one of our ablest lawyers studious, laborious and efficient, as wise and farsighted as he was honest and reliable. He was not a showy or a brilliant man, but few lawyers were more successful. When he went into court, he was always fully prepared, a master of the law and the facts of his case. He was not a great orator, but his fellow-men knew of his rectitude of purpose, and listened to him with attention and confidence, so that he was powerful before a jury; and for the same reason the courts heard him with deep interest, realizing that he knew the law of his case and would not stoop to deception.

Fortunately, he was blessed with length of days—days that were full of service, of charity and loving kindness. He was a blessing to the community where he dwelt, and an honor not only to his city, but to our State. He died as he had lived, a Christian gentleman, without fear and without reproach; and the honor, love, obedience and troops of friends that should attend old age were his in richest measure. Many are the friends who mourn his loss, among whom I take an humble place, deeply regretting that this brief tribute is so unequal to his worth.

IN MEMORIAM.

JACOB MONROE CARTER

On January 4, 1932, Mr. Paul Jones of Texarkana presented the following resolutions of the Texarkana bar.

Jacob Monroe Carter was born in Pike County, Arkansas, October 5, 1865, and was educated in the schools and colleges of Arkansas. He was a college graduate and came to Texarkana, Arkansas, in 1899, and entered the law office of Scott & Jones as a student and read law in that office and was admitted to the bar the following year.

In his early life he manifested that he was a man of sterling character, high purpose and delightful personality, and endowed by nature with a strong analytical mind, *and he had a fixed and steadfast determination to succeed.* The law is a jealous mistress, and he was her loyal devotee. His friends predicted for him the successful career which he attained, both at the bar and on the bench. He was elected prosecuting attorney of the Eighth Judicial Circuit of Arkansas and filled the office with honor and distinction. He prosecuted and defended cases with equal fervor and ability, and was never known to swerve from his duty or loyalty to a client, either State or individual. His was a pure, just, independent and even defiant spirit that spurned dissimulation and evasion, and he struck straight at the wrong wherever he found it.

He was later elected judge of the Eighth Judicial Circuit of Arkansas and his loyalty to duty and his courage in its performance was never moved by prejudice or by public clamor, which at times has swayed public officials, nor by personal friendship, and he hewed to the line and dealt out even-handed justice to friend and foe alike. In his honest, pure and sturdy character he stood out great as a judge as he did as a man.

He was a devoted husband and father and a loyal friend, and we cherish his memory.

RESOLVED, that in the death of Judge Jacob Monroe Carter the bar of Arkansas has lost one of its most prominent and valued members, the State of Arkansas a brave, true and loyal citizen an able lawyer and jurist and strong man.

RESOLVED, that a page of the record of the Circuit Court of Miller County be dedicated to the memory of Judge Carter, and that these resolutions be inscribed thereon, and that a copy of these resolutions be transmitted to the family of our deceased brother.

Paul Jones,

Will Steel,

W. H. Arnold, Sr., *Committee.*

Judge Kirby spoke as follows:

I knew Judge Carter well. We were young men together, long partners in the practice of law. The firm was dissolved on account of

politics. He was elected Circuit Judge and I was elected Attorney General, thus ending our partnership.

He was a man of striking appearance and personality, of mould and character rugged as the eternal hills of his old Pike County home—

“A combination and a form indeed,
Where every god did seem to set his seal,
To give the world assurance of a man.”

He was married to Miss Nelle Estes, gracious and charming daughter of Judge Benjamin Estes of Texas, a captain in the Confederate Army, and sister to Judge Lee Estes of the U. S. District Court for the Eastern District of Texas. He lived to see their four children prepared and well started on life's pilgrimage.

He was college trained, having attended Ouachita Baptist College and the Arkansas University. He was a profound and accurate thinker, direct, exact and forceful in speech, powerful in argument and debate, and intense in everything.

As prosecuting attorney he was most successful, the strongest prosecutor I ever knew, a terror to evildoers. He was a learned, just and upright judge, most efficient in the dispatch of the business of administration of justice. But for the Spanish American War and the action of the Arkansas Legislature, he would have risen to the greatest heights of public service in the broad field of national affairs. He was defeated for nomination to Congress in the old third district, including the territory of his judicial district, by the veteran Congressman, Thomas C. McRae, incumbent for 16 years and later Governor, because of the breaking out of the war, but made a remarkable race. He immediately organized a company of volunteers for service, but the war was quickly over before it got into action. The State was re-districted by the Legislature before the next race leaving out his old territory, except his home county, putting him into an alien district, the small end of a large new district, where he was unsuccessful in the race for nomination, losing by a small plurality.

He then resumed the practice of law with his son, Ben Carter, a captain in the A. E. F., already a good lawyer, and continued in the successful practice until his death.

He was a fervent patriot, a progressive citizen, a successful lawyer, a learned and just judge and a kind and loving husband and father—his life was a success. “He played a man's part in the world of men” and death struck him and—

“Lay down the wreck of power to rest.”

II.

OPINIONS NOT REPORTED.

By order of the court the following opinions are omitted as of no value as precedents:

- Atkinson *v.* Reynolds; appeal from Jefferson Circuit Court; T. G. Parham, Judge; affirmed December 14, 1931; per Hart, C. J.
- Brittain *v.* Collum; appeal from Van Buren Circuit Court; J. F. Koone, Judge, affirmed January 25, 1932; per Humphreys, J.
- Butler *v.* State; appeal from Grant Circuit Court; Thomas E. Toler, Judge, affirmed December 21, 1931; per McHaney, J.
- Chambers *v.* State; appeal from Polk Circuit Court; A. P. Steel, Judge; affirmed September 28, 1931; per Hart, C. J.
- Clark County Bank *v.* Shaver; appeal from Clark Circuit Court; Dexter Bush, Judge; affirmed October 26, 1931; per Kirby J.
- Connelly *v.* Road Improvement Dist. No. 2 of Conway County; appeal from Conway Chancery Court; W. E. Atkinson, Chancellor; affirmed November 30, 1931; per Kirby, J.
- Creek *v.* Baxter; appeal from Union Chancery Court; George M. LeCroy, Chancellor; affirmed November 16, 1931; per Kirby, J.
- Eldridge *v.* Bemis; appeal from Miller Circuit Court; Dexter Bush, Judge; affirmed July 13, 1931, per Humphreys, J.
- Evans *v.* State; appeal from Jackson Circuit Court; S. M. Bone, Judge; reversed January 11, 1932; per Smith, J.
- Farmers' Cotton Oil Co. *v.* Brint; appeal from Hempstead Circuit Court; Dexter Bush, Judge; reversed July 6, 1931; per Kirby, J.
- Gravette Construction Co. *v.* Gregory; appeal from Mississippi Chancery Court, Osceola District; J. M. Futrell, Chancellor; affirmed November.
- Grogan *v.* State; appeal from Sharp Circuit Court; John L. Bledsoe, Judge; affirmed December 21, 1931; per Humphreys, J.
- Hall *v.* State; appeal from Fulton Circuit Court; John L. Bledsoe, Judge; affirmed November 30, 1931; per Hart, C. J.
- Hammans Lumber Co. *v.* Fricker; appeal from Arkansas Circuit Court, Northern District; W. J. Waggoner, Judge; affirmed November 2, 1931; per Butler, J.
- Houston *v.* State; appeal from Logan Circuit Court, Southern District; J. O. Kincannon, Judge; affirmed December 21, 1931; per Mehaffy, J.